No. 11,666

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Acc 12; 2482 (2482)

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

DALY B. ROBNETT and
BENJAMIN F. KOSDON,
909 Broadway Arcade Building, Los Angeles 13,
Attorneys for Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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Comes now the appellant, Sam Ormont, and respectfully petitions this Honorable Court to grant his petition for rehearing for the following reasons:

I.

Defendant Ormont Was Once in Jeopardy.

That the appellant Ormont's plea of once in jeopardy was well taken. Appellant Ormont had a vested right to be tried by the first jury that was duly impaneled, accepted and sworn—neither he nor his counsel raised any question as to the competency of said jury—made no objection to the reference by the prosecutor to the O.P.A. case—and made no motion, suggestion, or intimation to the court that said jury should be discharged—the prosecuting attorney made no motion or suggestion that the jury be discharged, therefore, so far as appellant Ormont was

concerned, the court was never called upon to exercise any "discretion" with respect to the competency of said jury to try said appellant, but notwithstanding appellant's right to have said jury try his case the court deliberately dismissed the said jury without appellant's consent and without the slightest cause for so doing.

The mere fact that a co-defendant (appellant Himmelfarb) through his counsel asked the court so far as he was concerned to dismiss the jury certainly was no justification for dismissing the jury as to appellant Ormont, and even if (which we question) the Judge was called upon or had a right to exercise any discretion with respect to appellant Himmelfarb's motion that certainly could not have the slightest binding effect upon appellant Ormont, and did not justify the court in depriving appellant Ormont of his vested constitutional right to be tried by the jury he had selected and sworn as the jury to determine his guilt or innocence. The court might well have proceeded with that jury as to defendant Ormont and granted defendant Himmelfarb a right to another jury as there was not then and never was any justification for the joinder of the two defendants in the trial in any event as was subsequently demonstrated with the court acquitting appellant Ormont on all counts of the indictment save and excepting Count I, and acquitting appellant Himmelfarb on all counts, save and excepting Count II.

This court has properly held that appellant Ormont had a vested right in the first jury that was sworn to try him—that the swearing of the jury constituted "jeopardy"—that his counsel could not without express authority waive such right and did not attempt to.

Under the authorities and particularly cited in appellant's opening brief on pages 88-93, including *Johnston v.*

Zerbst, 304 U. S. 458, 464; *Glasser v. United States,* 315 U. S. 60, 70; *Von Moltke v. Gillies,* 332 U. S. 708, 723; *McCrea v. Jackson,* 6th, 148 F. 2d 193, 197, the constitutional right of a defendant not to be placed in jeopardy but once is not to be frittered away and yet that was what was done in this case, and as was held in the case of *Cornero v. United States,* 9th, 48 F. 2d 69, there must be an *absolute necessity* before the court is justified in discharging a duly impaneled jury. In this case there was no absolute necessity; in fact there was *no necessity* to discharge the jury and the trial judge in passing upon the motion of appellant Himmelfarb to discharge the jury stated in substance that he believed no harm had been committed by the remark of the prosecutor and that he, the judge, having immediately instructed the jury to disregard the remark had cured any possible adverse effect, but finally he stated that it was possible (not probable) that he had not completely cured it and therefore with the express consent of the prosecuting attorney he discharged the jury, *but without any consent of appellant Ormont.* (Italics ours.)

In the case of *Hunter v. Wade,* affirmed under the name of *Wade v. Hunter,* 336 U. S. 684, the Supreme Court adopted the rule laid down in the *Perez* case (*United States v. Perez,* 9 Wheat. 579, 6 L. Ed. 165) and based on the Manual for Court-martial, paragraph 75 A, together with the fact that the tactical situation brought about by a repeatedly advancing army was responsible for the withdrawal of the charges from the first Court-martial. The majority opinion in its closing, stated:

> "This case presents extraordinary reasons why the judgment of the commanding general should be accepted by the courts."

The rule laid down in the *Perez* case was quoted with approval as follows:

> ". . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, *the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes* . . ." (Italics ours.)

In the case of *United States v. Potash,* 2nd, 118 F. 2d 54, 56, only eleven jurors returned to the court, and the court said:

> "The inference is plain that one of the jurors was incapacitated to continue. Under such circumstances the court had discretion to discharge the jury . . ."

and therefore the court did exercise its discretion in accordance with the rule laid down in the *Perez* case as stated as one of the reasons where a jurist may exercise its discretion to discharge a jury before verdict and as stated in Wharton's Criminal Law, 12th Edition, Volume I, Section 395.[1]

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[1]The only causes for which a jury duly impaneled and sworn to try an accused on a criminal charge can be discharged by the court without a verdict are (1) consent of the prisoner, (2) illness of (a) one of the jurors, (b) the prisoner, (c) the court, (3) absence of a juryman, (4) impossibility of the jurors agreeing on a verdict, (5) some untoward accident which renders a verdict impossible, and (6) extreme and overwhelming physical or legal necessity.

The Supreme Court in the *Wade v. Hunter* case held in view of the Manual for Court-martial permitting a continuation of an action to obtain the benefit of other witnesses and the tactical situation constituted the "urgent necessity."

In the case at bar there was never any "imperious necessity," no *emergent, urgent or manifestly compelling reason* for discharging the first jury, nor as said in Wharton's Criminal Law, *supra,* or by the yardstick laid down in the *Perez* case (approved in the *Wade* case) there was no consent of Ormont, no illness of a juror, of the prisoner, of the court, absence of a juryman (as existed in the *Potash* case), no impossibility of the jurors agreeing on a verdict, no untoward accident that rendered a verdict impossible, no extreme and overwhelming physical or legal necessity (as existed in the *Wade* case), nor as said in the *Potash* case, nor did a situation exist that came within the pronouncement of the *Perez* case, "* * * the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes; * * *"

No such impelling circumstances existed, nor did any plain nor obvious causes exist. So far as appellant Ormont is concerned, and he is the only one concerned on this point, he did not, nor did his counsel at any time, intimate that he was dissatisfied with the jury or felt that he had suffered the slightest prejudice by the reference by the prosecuting attorney to another case, which reference the prosecutor probably had a legal right to make—made no motion, suggestion, or intimation to the court that said jury should be discharged—neither did the prosecuting attorney make such suggestion, intimation, or motion—the jury had been carefully selected before it was passed

and accepted by appellant Ormont's counsel, and appellant was content therewith and after the jury was duly sworn he had a vested right to be tried by that jury of which right he could not be divested in the absence of the existence of one or more causes laid down in Wharton's Criminal Law, *supra*, yet the trial court did violate appellant's right to be tried by said jury without any "imperious necessity."

So far as appellant Ormont was concerned, the trial judge was never, in any manner, called upon to exercise any discretion and without having the question presented to him by appellant Ormont in some form calling for the exercise of discretion he had no right to pretend to exercise discretion so far as this appellant is concerned. The fact that Judge Hall was called upon by Mr. Himmelfarb's counsel to pass upon the matter did not justify the trial court in depriving appellant Ormont of his vested right to be tried by the first jury.

This court has properly held in line with the impelling authorities that appellant Ormont had a vested right to the first jury that was sworn to try him—that the swearing of the jury constituted "jeopardy" (*Cornero v. United States,* 9th, 48 F. 2d 69, 73)—that his counsel could not without express authority waive such right and did not do so—and that silence was not consent to the discharge of the jury.

Using the *Perez* case as a yardstick to determine whether or not double jeopardy exists while there is no question about the fact that the trial court must exercise a certain amount of discretion and must be given certain discretion, but to extend the *Perez* case now to hold that trial court has a right to exercise its discretion to discharge a jury at any time it sees fit is to extend the rule to the

point where the yardstick laid down in the *Perez* case is meaningless and permits the court to take away a given constitutional right of a defendant and comes in the pervue of the remark made by Justice Murphy in the *Wade* case wherein he stated:

> "The guarantee of the constitution against double jeopardy is not to be eroded away by a tide of plausable appearing exceptions."

and would lead us to the point where we are no longer a government of laws, but a government of men.

Therefore, we urgently petition this court for a rehearing and reconsideration of said case and particularly of said point and for the following points hereinafter raised as we sincerely believe that appellant Ormont was twice placed in jeopardy and that on a reconsideration this Honorable Court will so determine.

II.

Privileged Communication.

Government witness Malin was a Certified Public Accountant [R. Vol. III, p. 1091] and, therefore, the appellant requests that the court reconsider its ruling with respect that "privileged communication are not recognized as between a client and his accountant" where the lawyer hires the C. P. A. for the reason that the Tax Court and Treasury Department recognize a Certified Public Accountant as one who can qualify to practice under their rules (see Rule 2 "b" United States Code Annotated, Title 26 I. R. C., Sec. 3200 to end, pp. 603) and further recognize that an accountant practicing before them has the same privileges as a lawyer including privileged communication. (Wigmore on Evidence, Vol. VIII, Section 2300

"a" Internal Revenue Bulletin, Vol. XV-2, July-December, 1936, p. 341.)

Regulations for the recognition of agents and attorneys, made by the Secretary of the Treasury, under authority of Statute 1884, July 7, U. S. Code, Title 5, Section 261; Section 2, paragraph e:

> "An agent enrolled . . . shall have the same rights, powers, and priveleges and be subject to the same duties as an enrolled attorney, . . ."

with certain limitations.

In this day of filing income tax returns that requires the aid of an accountant, to hold that no privilege exists between a C. P. A. and a client *wherein a lawyer hires a C. P. A. to help him,* is to overlook the fact that the C. P. A. is as much or more of a necessity than a secretary in the conduct of tax work and to hold that a client loses his privilege because of the presence of a C. P. A. on the theory that the third person is not indispensable in order for the communication to be made to the attorney, we must reach a very strained and erroneously strange conclusion, because it is common knowledge of which this court cannot only take judicial notice, but would have to close its eyes to the existing facts if it came to the conclusion that most lawyers know more about tax matters than most C. P. A.'s, and is contrary to the views expressed by Mr. Wigmore who was considered one of the foremost authorities on the subject of evidence.[1]

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[1]Section 2311, Volume 8, page 602, 3rd Edition, Wigmore on Evidence. One of the circumstances, by which it is commonly apparent that the communication is not confidential is the presence of a third person, *not being the agent of either client or attorney.* (Italics ours.) Wigmore stresses the waiver by the presence of a person (other than the agent of either).

If the ruling that privileged communications are not recognized as between a client and his accountant where the lawyer hires the C. P. A. is permitted to stand unchanged, the court will have established a very dangerous precedent that surely will plague it in the future because to permit the rule to stand would make every C. P. A. an involuntary "stool pigeon" for the government involving the millions of persons who have heretofore relied on government regulations that the privilege extended to the client when he retained the C. P. A.

III.

Violation of the Constitutional Amendment V in Attempting Before the Jury to Compel the Defendant to Produce His Books.

Specification of Error 52 is referred to in court's opinion as 42. See pages 26, 27, and 28 of opinion. The court agrees with appellant Ormont that it is error to request a defendant in a criminal case in the presence of a jury to testify or produce documents against his will, although he makes no objection, but then it reaches the conclusion that it was not prejudicial because there is "no showing that the jurors knew of the service and, too, that most likely they didn't; the court immediately quashed subpoena." For the court to reach the conclusion that there was "no showing that the jurors knew of the service and, too, that most likely they didn't" is contrary to law in that a presumption exists that one who looks sees, or a person is presumed to see that which he could see by looking. *Awtio v. Miller,* 92 Mont. 150, 11 P. 2d 1039; *Horton v. Atcheson, Topeka, Santa Fe Ry.,* 161 Kans. 403, 168 P. 2d 928; *Bleirer v. Wolf,* 23 Wash. 2d 368, 161 P. 2d 145; *Calvert v. City of Seattle,* 23 Wash. 2d 817, 162 P. 2d 441; *O'Brien v. Schellberg,* 59 A. C. A. 933, 939,

140 P. 2d 159, 162; *Collier v. Los Angeles Ry. Co.,* 60 A. C. A. 221, 140 P. 2d 206. "This presumption is itself a species of evidence, and it shall prevail and control . . . unless it is overcome by satisfactory evidence . . .," citing from *Westberg v. Wilde* (1939), 14 Cal. 2d 360, 94 P. 2d 590. We wish to further call the attention of the court that the deputy marshal was in uniform, had a United States marshal badge in plain view and came right in front view of the jurors and handed appellant Ormont the subpoena. Certainly the motion to quash was granted, *but the hearing on the motion was outside the presence of the jury* and in that connection it in respectfully submitted that the court *did not instruct the jury to disregard the activity of the United States attorney.* (Italics ours.) [R. Vol. II, pp. 805 to 809.] This Honorable Court is under the erroneous impression that the trial court directed the jury to disregard the error because it cited *McDonough v. United States,* 9th, 299 Fed. 30, 42, in which case this court attempted to distinguish the *McKnight* case from the *Ormont* case where a demand for producing incriminating documents was made by government counsel, just as in the *Ormont* case, by the direction of the trial judge, *but in the Ormont case no direction was made to the jury to disregard the error.* (Italics ours.) In the *McDonough* case, the case of *McKnight v. United States,* 115 Fed. 972, 976, is again distinguished:

> "The situation was, in fact, very different. In the trial court in that case a demand was made by counsel for the government, acting by direction of the trial judge upon the defendant to produce an incriminating document. This was plainly error, *but there was no order to the court directing the jury to disregard the error.* Had there been such an or-

> der as there was in this case, the inference is that the Circuit Court of Appeals would have held that the error was cured." (*McDonald v. United States,* 299 Fed. 42. See footnote of pages 27 and 28 of court's opinion.) (Italics ours.)

Even in the case of *United States v. Rosenstein,* 2nd, 34 F. 2d 630, 634, the court stated:

> "The court instructed the jury to disregard this request (to defendant to furnish a check as evidence against himself), stating that the appellant was not called upon to produce papers in his possession to be used against himself."

If it was improper to ask for the production of checks, that error was cured by the caution given to the jury. NO SUCH CAUTIONARY INSTRUCTION WAS GIVEN FOR APPELLANT ORMONT. (Italics ours.)

The case cited by the court of *Fitter v. United States,* 2nd, 258 Fed. 567, 576, is readily distinguishable, for the court there instructed the jurors if they heard the improper remark of the prosecutor to disregard it, and the error was therefore harmless. Moreover, it is to be noted that in *Bain v. United States,* 6th, 262 Fed. 664, 667, in the footnote on page 27 of the opinion:

> "The trial court did everything possible to neutralize the false step which had been made."

To make matters worse in the Ormont case, the United States attorney thereafter argued that the books were in evidence even though the books were never in evidence. (Italics ours.) It is, therefore, respectfully submitted that appellant Ormont's constitutional right was breached and

that to not recognize that the plain error was not corrected and therefore prejudicial is to:

> "Condone a dangerous laxity on the part of the trial court in the discharging of its duty to protect the fundamental rights of the accused." (*Glasser v. United States,* 315 U. S. 60, 72 and further to quote from *Cornero v. United States,* 9th, 48 F. 2d 69.)

In the *Cornero* case with respect to the plea of former jeopardy, the court said:

> "We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice."
>
> "The guarantee of the Constitution . . . is not to be eroded away by a tide of plausible-appearing exceptions." (*Wade v. Hunter,* 336 U. S. 684 at 694, dissenting opinion.)

Attention is further directed to this Honorable Court's opinion, pages 4 and 5, wherein the court cited in its footnote *Brady v. United States,* 8th, that a strong presumption is raised against the waiver of fundamental rights by an accused, and then continues that the accused constitutional rights are jealously and vigilantly guarded, citing *Johnston v. Zerbst,* 304 U. S. 458, 464; *Glasser v. United States,* 315 U. S. 60, 70; *Von Moltke v. Gillies,* 332 U. S. 708, 723; *McCrea v. Jackson,* 6th, 148 F. 2d 193, 197.

Wherefore, it is respectfully submitted that using the Supreme Court's standards of protecting the constitutional right of a defendant, the court by failing to caution the jury to disregard the activity of the prosecuting attorney,

or otherwise instruct the jury with respect thereto deprived the defendant of a fundamental constitutional right, and as said in the case of *Gillespie v. State,* 5 Okla. Crim. 546, 115 Pac. 620 (Ann. Case, 1912, p. 259):

> "When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon."

IV.

Prejudicial Argument of District Attorney.

This Honorable Court concedes that some of the action of the United States attorney are subject to criticism, but then states that they are not such as to require a reversal of the judgment. We pray that the court reexamine the conduct of the United States attorney. The United States attorney argued:

> "And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in *1943* (italics ours) (defendant Ormont was acquitted by the court prior to the argument for the year 1943) out of the $12,000 he bought about $8000 worth of bonds. You remember that testimony, $8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference [R. Vol. IV, p. 1476] from that, that the unreported income which Mr. Eustice claims this man accumulated during that year because he bought $8000 worth of bonds.
>
> Take the $8000 and then look at this Schedule No. 42 which shows how many bonds were actually

bought during that year and see if you don't find over $50,000 worth of bonds bought that year—$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the Schedule and it is in evidence.

What is $8000 off of that? It is $42,000. Well, let's assume he had $8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know." [R. Vol. IV, pp. 1476, 1477.]

This argument could not have been anything but prejudicial, as the evidence was contrary to the facts submitted by the government witnesses, was false, and could have only confused the jury, because it left the jury with the impression that appellant Ormont did not account for $42,000 in government bonds and being as he was tried only for the year 1944, the argument misled the jury to believe the government charge that the defendant filed a false return, showing a gross taxable income of $35,982.52.

Counsel stated that because Mr. Ormont told Mr. Link to change some figures on the books that that was falsifying the records. [R. Vol. IV, p. 1462.] To demonstrate to this court the viciousness and prejudice of that argument of the United States attorney this Honorable Court has followed the false argument of Mr. Strong, the United States attorney, for in its footnote on page 14 of its opinion the court stated:

"* * * Ormont had instructed him (Mr. Link) to make erroneous entries and to change calculations

in order not to lose certain government subsidies, which Link did. * * *"

See Record, Volume II, page 504, where the following transpired:

"Mr. Link: He told me that those were checks in payment of differences and changes which he had asked me to make, and which he made on the original bills in order to avoid the loss of the subsidy payments. That those were payments which he wanted to appear on the books as being made to offset the loss of subsidy payments.

Mr. Robnett: I move to strike the answer out upon the ground that it does not prove or disprove anything in this indictment.

Mr. Strong: It proves that the records are false.

The Court: Government counsel's statement to the jury (256) will be disregard by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel."

This testimony was with respect to the year 1943 for which year the defendant Ormont was acquitted and wherein we quote from Record, Volume II, pages 471 to 472 as follows:

"The Court: That was a recorded increase in the amount of money paid for the purchase of cattle?

The Witness (Mr. Link): That is right."

On page 472, in speaking of adding the items on the books as additional cost, the witness said of Mr. Ormont as follows:

"A. He made a check out for it.

The Court: *He did what?* (Italics ours.)

The Witness: He made the check out for that increased amount.

The Court: He actually paid the additional money?

The Witness: He paid the additional money with a check which was drawn.

The Court: He paid the additional $3000?

The Witness: Yes.

The Court: So that the books were accurate when it said that he spent $3000 more?"

Checks were thereafter introduced showing the payment of the exact amounts. [See R. Vol. II, pp. 486-7, and Appellant Ormont's Reply Brief pp. 11 and 12.] How can it be argued that the instruction by Ormont to increase an amount which were actually paid constitute a falsification of Ormont's records. To now hold after the defendant was acquitted for 1943 and after the government's own witness, Link, previously testified to the question that the return for 1943 was false to the extent of $3000 and $3000 only is to [see R. Vol. II, p. 471] come to a conclusion that under no circumstances can a businessman request an accountant to change his records even though those changes are necessary to reflect the true circumstances of a transaction for fear that at some later time someone might draw an inference that the change or that the request for the change of the record might constitute a falsification and would therefor set a standard of keeping books that would be tantamount to require an individual to never make a mistake or in other words maintain a standard of perfection.

Mr. Strong, the United States attorney, argued on Record, Volume IV, page 1559:

". . . The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

Not only was this statement false because the books were never admitted into evidence, but gives added emphasis to the objection by appellant Ormont to being served with a *subpoena duces tecum* in the presence of the jury during the process of the trial wherein the court subsequently granted the appellant Ormont his motion to quash, *but did not in any other manner instruct the jury to disregard the activity of the United States attorney.* (Italics ours.)

In *Pierce v. United States* (86 F. 2d 949), the court said:

> "Of more serious import is the complaint that the trial was not fairly conducted, and that conviction was had otherwise than in accordance with the law and the evidence, for: 'A trial in court is never . . . purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence."
>
> *New York Central R. R. Co. v. Johnson,* 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706.

* * * * * * * *

> "Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow, as in Pharr v. United States, 48 F. 2d 767 (CCA 6). At other times transgressions may be so slight that if promptly corrected and their repetition avoided the court may not say that the jury was prejudiced,

though often the mere cumulative effect of a course of improper conduct compels reversal."

Volkmor v. United States, 13 F. 2d 594 (C. C. A. 6);

Frantz v. United States, 62 F. 2d 737 (C. C. A. 6).

* * * * * * * *

"It is quite true that the court ruled correctly upon all objections interposed by the defendants, but in most instances the ruling came after the mischief had been done, and it was clearly a case where the misconduct of the prosecutors was neither slight nor confined to a single instance, but so pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential. Berger v. United States 295 U. S. 78, 89, 55 S. Ct. 629, 632, 79 L. ed. 1314. As was said in the case: 'The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. *But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.*'" (Italics ours.)

* * * * * * * *

"The point was made below that the improper conduct of the prosecuting attorney was waived by failure of the defendants to move for a mistrial, and reliance is placed upon Chadwick v. United States, 141 F. 225 (CCA 6); Sparks v. United States, 241 F. 777 (CCA 6); Carter v. Tennessee, 18 F. 2d 865 (CCA 6); and Dunlop v. United States, 165 U. S.

487, 17 S. Ct. 375, 41 L. ed. 799. We are not here so much concerned with improper argument springing from the heat and enthusiasm of advocacy, as we are with what appears to have been a studied effort to inject into the case irrelevant and prejudicial matter for the purpose of influencing the verdict, and its continued repetition after adverse rulings. Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so. Similar latitude in respect to irrelevant matter permitted to counsel for the defendants neither vindicates nor palliates the license assumed by the prosecutors, nor lessens its destructive effect upon the fairness of the trial. Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to goven impartially is as compelling as its obligation to govern at all; and whose interest, therefore, is a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' Berger v. United States, *supra.* 'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.' N. Y. Central R. Co. v. Johnson, *supra,* 279 U. S. 310, 318, 49 S. Ct. 300, 73 L.

> ed. 706. Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error."

And in *Kassing v. United States* (87 F. 2d 183), the court deemed the following argument of the United States attorney improper and unsound in law and fact:

> "The Government of the United States is trying to convict this man, and on this undisputed evidence we are entitled to have twelve reasonable men believe he was a member of this gang and if it was the act of one it was the act of all. If he had any legitimate business down here, gentlemen, God knows we are entitled to have him explain to you twelve men here . . . not him—but by other witnesses."

To the same effect:

> *United States v. Perlstein* (120 F. 2d 276);
> *Weathers v. United States* (117 F. 2d 585);
> *Ippolito v. United States* (108 F. 2d 668).

Taking into consideration the misstatements of government's counsel together with the admitted error of serving the defendant with a *subpoena duces tecum* in the presence of the jury and during the course of the trial together with the other misstatements by government counsel as set forth in appellant's opening brief, can it be argued that the remarks and conduct of the government counsel was anything but prejudicial in view of the fact that this was a case involving money, and it is respectfully submitted that the case of *Berger v. United States,* 295 U. S. 78, is in point.

V.

Alleged Admission Given Upon Promise of Confidence.

The court on page 19 of its opinion states that there is no proof that a promise of confidence was made nor proof of any promise permitting adjustment of discrepancies. The appellant wishes to direct its attention to [R. Vol. III, p. 1172] page 120 of appellant's opening brief:

> "Mr. Robnett: Q. And at that time Mr. Ormont, before making any statement of anything else asked you, did he not, whether or not anything he might say there would be kept in confidence by you and those present, or words to that effect?
>
> Mr. Bircher: A. Yes, he asked something of that kind."

In view of the United States Treasury Department circular to refrain from criminal prosecutions where the taxpayer makes voluntary disclosures (see *United States v. Lustig,* 67 Fed. Supp. 306), to now hold that his attorney (Mirman) misadvised him and that the circular issued by the Treasury Department is not recognizable by the courts is to encourage lawyers to advise their clients not to talk, and not to cooperate with the Internal Revenue Department and to prevent fulfillment of effecting the purpose of the circular, namely, to secure the revenue to which the government is justly entitled and so greatly in need. The record is replete that the appellant did cooperate with the government by giving it his books, etc., after having asked that the information be kept in confidence.

VI.

Variance.

The appellant requests that this Honorable Court reconsider the appellant Ormont's Specification of Error 7. This Honorable Court's holding therein, it is respectfully submitted, is in conflict with its very recent case of *Carney v. United States,* 163 F. 2d 784. (See pp. 17 to 20 of appellant Ormont's reply brief.)

VII.

Residence of Defendant Ormont.

Appellant finds no argument with the law as laid down by this Honorable Court, but agrees with its citation of *Tinkoff v. United States,* 7th, 86 F. 2d 868, 876, where it is said that:

> ". . . When he is charged with wilful effort to defeat the tax by presenting a false return no *allegation* of duty upon the part of appellant is necessary." (Italics ours.)

In so far as the indictment is concerned the indictment properly alleged:

> "That on or about the 15th day of March, 1945, in the Southern District of California and within the jurisdiction of this court, etc. . . ."

It is respectfully submitted that this matter does not involve a question of allegation but a matter of failure to prove. The plaintiff must establish venue. The case of *Tinkoff v. United States,* 7th, 86 F. 2d 876, said:

> ". . . no allegation of duty upon the part of appellant is necessary . . ."

can be only construed with the court's previous sentence if no return were made,

". . . it might have been reasonably necessary to allege and show a duty in that respect upon his part . . ."

and has no bearing whatsoever on the question of venue.

"Under this constitutional provision, Sixth Amendment, the venue is as material as any other allegation in the indictment and the burden to prove it rests upon the government, . . ."

citing *Vernon v. United States,* 146 Fed. 121, 126. (*Moran v. U. S.,* 264 Fed. 768, 770.) Failure to call attention to the government's lack of proof of venue at the trial does not waive the error and judgment will be reversed therefor. (*Brightman v. United States,* 7 F. 2d 532.) It is further respectfully submitted that the question of venue was not the question presented in the *Tinkoff* case.

VIII.

Other Similar Offenses.

The appellant Ormont urges that this Honorable Court reconsider its view as to Errors 50 and 51 (see pp. 21 and 22 of opinion) for the reason that none of the cases cited by the court had the defendant been acquitted of all the other counts and, therefore, the cases cited by the court are clearly distinguishable,[1] for the reason that leav-

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[1]In *Allis v. U. S.,* 155 U. S. 117, 15 Supreme Court 36, 39 L. Ed. 91, evidence was admitted for the purpose of showing motive and intent in the plan followed; the defendant there went on trial *on all counts.* (Italics ours.) Likewise *Tinkoff v. U. S.,* 7th, 86 F. 2d 866, 879. In the case of *Chattock v. U. S.,* 77 F. 2d 961, cert. den. 296 U. S. 609, there was no acquittal on any of the counts for the defendant. In the case of *Emmich v. U. S.,* 6th, 298 Fed. 5, cert. den. 266 U. S. 608, the defendant there admitted an adjustment or liability for the previous year and the defendant was not acquitted or tried for any prior years. In the case of *Rose v. U. S.,* 10th, 128 F. 2d 622, 625, the defendant there was found guilty on each count; likewise in the case of *Malone v. U. S.,* 7th, 94 F. 2d 281.

ing all that evidence in could only go to show *lack of intent* as expressed by the trial court (italics ours):

> "The Court: I thought that it benefited the defendants leaving it in . . ." [R. Vol. IV, p. 1610.]

and leaving all that mass of evidence could and did have only the effect of confusing the jury as stated in the case of *People v. Albertson,* 23 Cal. 2d 580, 581, and moreover the court's finding the defendant "not guilty" on the evidence for 1942 and 1943 the issue of wilfulness or intent became *res judicata* for the years 1942 and 1943 and for that reason said evidence should not have been used for the year 1944.

IX.

Confusing Instructions.

This Honorable Court concedes that Specifications of Errors 74 and 76 was well taken in that the court erred in instructing the jury as follows:

> "In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944." [R. Vol. IV, p. 1578.]

And:

> "The Internal Revenue regulations, which have the force of law, provide that the type of books *and* records which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books *and* records which contain entries which

are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in returns, and that such books *and* records shall be kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

"If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums earned must be reported upon the calendar year return for the year in which they were earned." (Italics supplied.) [R. Vol. IV, p. 1583.]

and then concludes that the jury was sufficiently instructed and could not have been misled by the instructions complained of. It is conceded that the law in the Federal Courts with respect to instructing the jury that the court will consider the instructions as a whole, but it is argued by the appellant Ormont that the law with respect to instructions is that:

"Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction, which was erroneous, as one or the other must necessarily be . . ." (*Haight et al. v. Vallet et al.,* 26 Pac. 897, at 898.)

That it is a sufficient ground for reversing a judgment has frequently been held. (*Haight et al. v. Vallet et al.,* 26 Pac. 897, at 898; *Guthery v. Carney,* 124 Pac. 1045, at 1050; *Nicola v. United States,* 72 F. 2d 780.)

There might be merit in the court's argument that the jury was not misled by the confusing instructions, except

for the fact that the United States attorney argued as to instruction 74 in particular that all that was necessary to convict the defendant Ormont was for the government to prove a substantial amount, and said that $11,000 was enough and is different and contradictory from the instruction which the court subsequently gave, and which said instruction this Honorable Court said cured the previously erroneous instruction, and as said in the case of *People v. Valencia,* 43 Cal. 552, where conflicting and contradictory instructions were given, the Supreme Court held that they could not disregard such conflict, and determined that there was error, even though the court had said that the jury ought to have found the defendant guilty.

Wherefore, appellant prays that his petition for rehearing be granted.

Respectfully submitted,

DALY B. ROBNETT and
BENJAMIN F. KOSDON,
By DALY B. ROBNETT,
Attorneys for Appellant.

We hereby certify that this petition is made in good faith, and not for the purpose of delay.

DALY B. ROBNETT,

BENJAMIN F. KOSDON.